IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 876 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE A.M.KAPADIA

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

AYUB HAFEJI ALITAPU

Versus

STATE OF GUJARAT

Appearance:

MR JIVANLAL G SHAH for appellants

MR SA PANDYA APP for Respondent

CORAM : MR.JUSTICE A.M.KAPADIA

Date of decision:25/06/98

C.A.V. JUDGEMENT

In this Criminal Appeal, appellants who were the original accused Nos.1, 2 and 3 before the trial Court have challenged the conviction and sentence imposed on them by the learned Additional Sessions Judge, Bharuch in Sessions Case No. 16 of 1988 dated 28.,9.1988. By the said judgment, accused No. 1 was held guilty of the offence punishable under Section 324 of the Indian Penal Code (hereinafter referred to as 'IPC' for short) and sentenced to suffer rigorous imprisonment for one year and to pay fine of Rs.500 and, in default, further to

suffer simple imprisonment for two months. Accused No.1 was also held guilty of the offence punishable under Section 323 read with Section 34 of IPC and was sentenced to suffer rigorous imprisonment for six months and to pay fine of Rs. 200 and, in default, further to suffer simple imprisonment for one month. Accused Nos.2 and 3 were also held guilty of the offence punishable under Section 323 of the IPC and were sentenced to suffer rigorous imprisonment for six months and to pay fine of Rs.200 and, in default, further to undergo simple imprisonment for one month. Accused Nos.2 and 3 were also held guilty of the offence punishable under Section 324 read with Section 34 of the IPC and were sentenced to suffer rigorous imprisonment for one year and to pay fine of Rs.500 and, in default, further to undergo simple imprisonment for two months. It was ordered that all the sentences should run concurrently. The learned trial Judge, however, acquitted original accused No.4 as he was not found guilty.

According to prosecution case, the incident occurred on 14.6.1987 at about 7.30 P.M. near S.T. bus stand of Kantharia village. As per the prosecution case, on 14.6.1987 the complainant - Iqbal Musa Mukardam Tatavala, alongwith the Sarpanch of Kantharia village, Abdulgani Suleman Kothia, had gone to Bharuch from their village, on scooter to attend conference of Congress Party in Patel Welfare Society. After attending the conference, at about 7.30 P.M. they were proceeding towards their village. When they reached near S.T. bus stand, all the four accused persons were standing there. Abdulgani Suleman Kothia slowed down the scooter. At that time, accused No.2, Mohmed Hafeji Alitapu, gave a blow to the complainant, Iqbal Musa Mukardam, on the left side of his head, with an iron pipe, as a result of which there was bleeding. At that time the Sarpanch stopped the scooter. In the meanwhile, accused No.3, Ibrahim Hafeji Alitapu, who is the brother of accused No.2, also inflicted a blow with iron pipe on the head of Abdulgani, the Sarpanch. Accused No.1, Ayub Hafeji Alitapu, also gave a knife blow on the person of the complainant near neck on chest, on left side. Accused No.4, Dawood Ismail Khalifa, also gave blows with iron rod on his legs and also on the left side of his body and also on the left hand. He also gave a razor blow on the back portion of waist. Simultaneously, the accused were also beating the Sarpanch and they were using filthy language and gave threat to kill them. Therefore, Iqbal Musa Mukardam, with a view to save his life, escaped from the scene of occurrence and went to S.R.P. party. Meanwhile, about 40 to 50 people gathered there and the accused fled away

from the scene of offence. This is the sum and substance of the complaint lodged by Iqbal Musa Mukardam Tatavala before the concerned police station.

On the basis of the complaint, the police started investigation, recorded the statement of witnesses, concluded the investigation and thereafter the accused were charge-sheeted for commission of offences as alleged hereinabove.

It may be incidentally mentioned that another FIR was also registered before the concerned police station by accused No.1 - Ayub Hafeji Alitapu against Abdulgani, the Sarpanch and Iqbal Musa Mukardam, the complainant in the present case, wherein the complainant Ayub Hafeji Alitapu alleged that on the same day at the same time and place, they were beaten by Abdulgani and Iqbal Musa Mukardam and in that attack one Kalia Mandla Vasava suffered fatal injuries and succumbed to the same. In pursuance of this FIR offence punishable under Section 302 of IPC was registered against those persons. Both the above mentioned FIRs arise out of the same incident. As the offence registered against Abdulgani and Iqbal Musa Mukardam Tatavala was exclusively triable by the Court of Sessions, the learned Magistrate committed the case to the Court of Sessions. As per settled legal principles of criminal jurisprudence, this case was also committed before the Court of Sessions, Bharuch for trial before the same Judge.

On committal of the cases and on receipt of the record and proceedings, the Sessions Court numbered this case as Sessions Case No.16 of 1988 against the present accused. Appropriate charge was framed against the accused for the commission of the alleged offence as mentioned hereinabove. The charge was read over and explained to the accused persons. They pleaded not guilty and claimed to be tried and, therefore, they were put on trial.

The prosecution, in order to bring home the charge levelled against the accused, examined several witnesses and placed reliance upon the documentary evidence viz., injury certificates, panchnama, etc. On completion of recording of evidence of the prosecution witnesses, further statement of the accused persons under section 313 of the Criminal Procedure Code ('the Code' for short hereinafter) was recorded wherein also they pleaded not guilty and claimed to be innocent. According to them they were falsely implicated in the case.

At the conclusion of the trial, the learned Additional

Sessions Judge recorded finding of conviction and sentenced the accused Nos.1 to 3 as mentioned hereinabove and acquitted accused No.4. The said conviction order is challenged before this Court in this appeal by the original accused Nos.1, 2 and 3, who are appellants No.1, 2 and 3 respectively.

In order to establish the case, the prosecution has relied mainly on two witnesses i.e., P.W.2, Iqbal Musa Mukardam (Ex.14) and P.W.2, Abdulgani Suleman Kothia (Ex.15). Both these witnesses were injured in the said incident. Prosecution has also placed reliance on the evidence of P.W.4, Ismail Mohmed Musa (Ex.16). According to the prosecution, witness Ismail Mohmed Musa was sitting on a culvert at the time of the incident.

At this stage, it may be appreciated that both the injured witnesses, P.W.2 and P.W.3, Iqbal Musa Mukardam and Abdulgani Suleman Kothia respectively, were accused in the cross case and were facing trial for the commission of alleged offence under Section 302 of IPC for committing murder of Kalia Mandla Vasava in the fight which had taken place simultaneously at the same spot where the incident giving rise to this criminal case had taken place.

The learned trial Judge had placed reliance mainly on the evidence of both these injured witnesses for basing conviction against the present appellants.

Learned advocate Mr. Jivanlal Shah while appearing for the appellants/accused has emphatically criticized the evidence of both the above injured witnesses. According to him, both these witnesses were facing trial for the offence under Section 302 of IPC. According to him, the complainant's party were the aggressor and they started the assault first in point of time and in the assault Kalia Mandla Vasava sustained serious injuries and succumbed to the same. Therefore the injured witnesses were the aggressors first in point of time and with a view to save them from the clutches of the prosecution in that case they lodged false FIR against the present accused. Mr. Shah, learned advocate for the appellants, has taken me through the entire evidence of the above said two witnesses and also pointed out the contradictions in their evidence vis-a-vis the medical evidence and serious infirmities therein.

Now, firstly, we shall examine the oral testimony of P.W.2, Iqbal Musa Mukardam, Ex.14. According to the prosecution, the complaint before the police station was

lodged by him. In the examination-in-chief he narrated similar version which he had stated before the police while recording his complaint. During the cross-examination he admitted that he knew Vali Isak Talati of his village who had filed criminal complaint against P.W.3, Abdulgani Suleman Kothia, for assaulting him with knife. He denied the suggestion that firstly they had beaten Dawood and thereafter killed Kalia Mandla Vasava. He admitted that the assault went on for about 5 to 10 minutes and a mob of about 50 to 60 gathered. He admitted the complaint that on 3.1.1987 they had gone to the house of accused No.1, Ayub Hafeji Alitapu, along with weapon to beat him. He admitted that one Valimahmed Ismail Pathan had also lodged a complaint against him and one Mohmed Husain Dasu had also lodged a complaint for commission of alleged offence under Section 323 and 504 of the IPC on the accusation that on 17.5.1987 they assaulted him. From the evidence of this witness, it appears that this witness is involved in so many crimes and several complaints were registered against him. One should not forget the fact that he was one of the accused in the cross case of this case wherein the accusation against him and one Abdulgani Suleman Kothia was of murder of one Kalia Mandla Vasava. Under the facts and circumstances, it appears that this witness is a history sheeter. It is settled principle of law that evidence of a history sheeter should be weighed very cautiously and carefully. Unless the evidence of such witness gets corroboration from independent witnesses, no reliance should be placed upon the sole testimony of such type of witnesses and no conviction can be based upon his sole testimony.

One another infirmity found in the evidence of this witness is that according to him, accused No.1, Ayub Hafeji Alitapu, gave knife blow on the left side near neck on chest while accused No.4, Dawood Ismail Khalifa, gave blow with iron pipe on the knee of both the legs and on hand. According to this witness, Mohmed Hafeji Alitapu gave a blow with iron pipe on left side of his head. P.W.1, Medical Officer Dr. Kailasben Gopalbhai Patel, was examined at Ex.8. According to her, on 14.6.1987 at about 8.45 P.M. she examined Abdulgani Suleman Kothia and found following injuries on his person:

(i) CLW on Right parietal region 3" x 1/2" x scalp deep.
(ii) Two CLW on occipital region each about 2" x 1/2" x scalp deep.
(iii) Abrasion on 1/3 of (L) leg 2" x 1/2".

On the same day at about 9.30 P.M. she examined Iqbal Musa Mukardam and found following injuries:

(i) Two CLW on (R) parietal region each about 2" x 1/2" x scalp deep.
(ii) CLW on occipital region 2" x 1/2" x scalp deep.
(iii) Incised wound on (L) side of chest anteriorly 4" x 1/4" x muscle deep.
(iv) Incised wound on back of chest 1" x 1/4" x muscle deep.
(v) Incised wound on (L) ring finger 1/4" x 1/4" muscle deep.

According to the complainant, he received three major injuries (i) on the head, (ii) on the chest near neck and (iii) on the legs while according to Dr. Kailasben whose evidence we have discussed hereinabove, he received in all three injuries on the head while on the leg he received only superficial injury. This is a material contradiction in the evidence of the complainant. Thus it is clear that he is not stating truth with regard to injuries received by him. So far as injury with knife is concerned, he has exaggerated the story. Had he received knife injury the doctor would have noted the same while examining him. From the above it is clear that this witness has no regard for the truth. Therefore, his evidence is not trustworthy and does not inspire any confidence and hence no credence should be given to his oral testimony.

So far as the evidence of P.W.3, Abdulgani Suleman Kothia, Ex. 15, is concerned, in the examinationinchief he has narrated similar version as stated by him before the police while recording his statement under section 162 of the Code. He also admitted in cross-examination that the incident of assault continued for about 5 to 7 minutes and about 40 to 50 people gathered there. He admitted that Saida, who happened to be the sister of accused No.1, Ayub Hafeji Alitapu, had lodged a complaint against him and Iqbal with respect to offence under Section 504 and 506 of the IPC which had taken place on 11.4.1987 and that was registered as Criminal Case No. 41/88. He further admitted that a case was also registered against him for cutting banyan trees from Kantharia school and at the conclusion of the trial he was sentenced and ordered to pay fine of Rs.1000/- He also admitted that a cross case was also registered against him in the very Court wherein the allegation against him was with regard to murder of Kalia Mandla Vasava. This witness was asked about registering several

cases against him. He admitted about registration of some cases against him but with regard to other cases he stated that did not remember.

From the overall appreciation of the evidence of P.W. 3, Abdulgani Suleman Kothia, Ex.15, it can be seen that he had also involved in many criminal cases, many criminal cases were launched against him and he was facing criminal trial in so many cases. Thus, it appears that he is also a history sheeter. While appreciating the evidence of Iqbal Musa Mukardam this Court found that he is a history sheeter and, therefore, no reliance can be placed on his oral testimony. Likewise witness Abdulgani Suleman Kothia is also a history sheeter and hence his evidence also cannot be given any credence without getting corroboration from independent witnesses.

P.W. 4, Ismail Mahmed Musa, was examined at Ex.16 and from his oral testimony it appears that he is from the complainant's party and is in good relation with Abdulgani Suleman Kothia. He stood as surety in favour of Abdulgani Suleman Kothia. He alongwith P.W.2 Iqbal Musa Mukardam and P.W.3 Abdulgani Suleman Kothia, were jointly involved in one chapter case. On further scrutiny of evidence of this witness it is clear that he appeared as witness and panch in so many cases. It appears that he was selected by police in so many cases as panch and witness. On overall appreciation of the evidence of this witness it is clear that he is from the complainant's party and is having good relation with the complainant as well as P.W.3, Abdulgani. He stood as surety for the complainant's party in so many cases. Not only that he deposed in favour of the complainant but was selected by the investigating agency also. Therefore, it cannot be said that he is an independent witness. In these circumstances, his evidence also is not trustworthy and the same does not inspire any confidence and hence no credence can be given to his evidence.

A glaring infirmity which can be noted in this case is that as per prosecution case the incident of assault continued for about 5 to 7 minutes and thereafter 40 to 50 people assembled at the place of occurrence. It is not understood as to why the prosecution has not examined a single person from the crowd who had gathered there, who would have been an independent witness and why the investigating agency selected the witnesses who are involved in several crimes? As discussed above, witnesses examined by the prosecution were charged with the offence of murder of Kalia Mandla Vasava which had taken place in the same incident in respect of which a

cross case of this case was also registered. The prosecution was unable to explain this infirmity. It is, therefore, clear that the prosecution has examined only interested witnesses. No reliance can be placed on the testimony of interested witnesses. Moreover, their evidence also suffers from contradictions about the injuries sustained as per medical evidence.

Another important infirmity in this case is that the prosecution has failed to explain the injuries on the person of the accused and the circumstances under which they received injuries. As discussed hereinabove, this was an incident of free fight between both the groups. Persons of both the sides received injuries. Both the injured witnesses examined by the prosecution were examined my the medical officer. P.W. 1, Dr. Kailasben, Ex.8, in her cross-examination admitted that on 14.6.1987 at about 11 P.M. she examined accused No.1,Ayub Hafeji Alitapu, and on examination she noticed following injuries:

(i) Abrasion of 1/2" x 1/2" on right side of the cheek, red in colour.
(ii) Bruise on right hand 1/2" x 1/2" size.
(iii) Incised wound admeasuring 1/4" x 1/8" on left index finger.

From the above mentioned injuries, it appears that injury No.3 was inflicted with a sharp cutting instrument whereas injuries No.1 and 2 were caused by hard and blunt substance. The medical office also examined accused No.3, Ibrahim Hafeji Alitapu and on his person she found following injury:

(i) CLW on the middle of of parietal region, scalp deep, 2" x 1/2".

Injury on the person of accused No.3 was serious. According to the medical officer, because of this injury brain haemorrhage was possible and there was also possibility of death of the injured. According to the medical officer, the said injury was possible by blow with iron pipe.

The medical officer had also examined one Hafeji Ali and on examination she found the following injuries:

(i) CLW on the parietal region of the head, scalp deep, 2" x 1/2".

(ii) Abrasion on the left thumb 1/2" x 1/4" red in

colour.

On the same day the she also examined accused No.2, Mohmed Hafeji Alitapu, and found following injuries:

(i) Complaint of pain in chest.
(ii) Two teeth were shaken.

Learned advocate Mr. Shah for the appellants, after pointing out these infirmities, has vehemently submitted that failure on the part of the prosecution to explain the injuries on the person of the accused or the omission on the part of prosecution to explain injuries is of great importance. If witnesses are not explaining the injuries two inferences can be drawn (i) that they are not eye witnesses and (ii) if they are witnesses, they are not the witnesses of whole occurrence and, therefore, their evidence is not capable of proving as to how incident has started. If they are witnesses for the whole incident and do not explain the injuries that would mean that they are not giving the true and correct whole picture of the incident.

In support of the above contention, Mr. Shah has placed reliance on catena of decisions of the Apex Court as well as this Court. Firstly, we my make reference to the judgment of the Supreme Court, reported in U.J. (S.C.) 1972 Vol.4, page 277 in the case of Tek Chand & Anr. v. State of Haryana, wherein the Supreme Court has held as under:

> "It is true that Antu or Tek Chand or some body of their party had used guns and caused injuries to the deceased Bakshish Singh and complainant Labh Singh with shots fired from their guns. But that does not necessarily mean that they were the aggressors. If we merely count the injuries received on both sides it would go to show that the complainant's party were the aggressors. The true facts with regard to the injuries received by Bakshish Singh and Labh Singh were not placed before the court and, therefore, the appellants, like Antu, were entitled to be acquitted."

Mr. Shah, learned advocate for the appellants, has relied upon another judgment of the Supreme Court in the case of Lakshmi Singh v. State of Bihar, AIR 1976 SC 2263 wherein the Supreme Court has held as under:

> "In a murder case, the non-explanation of the injuries sustained by the accused at about the

time of the occurrence or in the course of altercation is a very important circumstance from which the Court can draw the following inferences:

(1) that the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version;

(2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable;

(3) that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case."

Mr. Shah has relied upon a judgment of this Court also in the case of Patel Bachubhai Bhurabhai v. State of Gujarat, 1984 GLH 1155, wherein this Court has held as under:

"Indian Evidence Act, 1872 - S. 3 - Appreciation of evidence - Criminal Trial - Injuries on the accused when can be said to have explained - The word "explanation" would imply explaining the circumstances under which the accused person sustained injuries - The fact that the injuries were seen by the witness during the incident or at the hospital would not amount to explain the injuries - The witnesses were expected to see clearly as to under what circumstances and in what particular manner accused received the injuries - If that was stated that would amount to explain the injuries - Otherwise it can be said that injuries are proved, but not explained - the omission on the part of prosecution to explain injuries is of great importance - If witnesses are not explaining injuries two inferences can be drawn (1) that they are not eye witnesses and (2) if they are witnesses, they are not the witnesses of whole occurrence - So their evidence does not prove how the incident has started - If they are witnesses for the whole incident and do not explain the injuries that would mean that they are not giving the true and correct whole picture of the incident."

So far as the proposition of law enunciated in the aforesaid judgments in case of non-explanation of the injury by the prosecution, the same will be applicable in

this case also.

Learned A.P.P. Mr. Pandya tried to convince that the injuries on the person of the accused were very superficial in nature and in view of the judgment of the Supreme Court in the case of Lakshmi Singh (supra) when the injuries were of superficial in nature, the ratio laid down in the said judgment is not applicable in the facts of the present case. This Court is not prepared to accept the aforesaid submission of the learned A.P.P. While appreciating the evidence of the medical officer with respect to the injuries on the person of the accused, it was found some of them were serious in nature. Injuries on the occipital and parietal region inflicted with sharp cutting instrument were serious in nature and cannot be described as superficial in nature. Further more as per the ratio laid down by the Supreme Court in the case of Lakshmi Singh's case (supra) evidence must be so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries. If the injuries are superficial in nature and the evidence is independent in such a case injuries on the person of the accused are not required to be explained. Three witnesses were examined by prosecution to prove the case with regard to the incident of assault out of which two were injured and they were allegedly involved in cross case of this case wherein the allegation was of murder of Kalia Mandla Vasava which was a more serious offence and, therefore, they cannot be called independent witnesses. Moreover, there is no clinching evidence to establish as to which party was the aggressor and which party initiated the quarrel.

From the aforesaid evidence of the interested witnesses who were involved in the cross case of this case, it is clear that both the groups were in inmical terms. The witnesses are history sheeters and were facing trial of murder. Because of non-explanation of injury on the person of the caused, the prosecution evidence is not free from doubt. The prosecution evidence is not trustworthy, reliable, cogent and clinching and does not inspire any confidence. Therefore, the one and only irresistible conclusion can be arrived at is that the prosecution has miserably failed to prove the case beyond reasonable doubt. Under the circumstances, this Court is unable to persuade itself to uphold the finding of conviction recorded against the appellants and, therefore, it is required to be quashed and set aside by giving benefit of doubt to the accused persons and

resultantly they are required to be acquitted.

In the premises, the appeal is allowed. The conviction and sentence imposed on the appellants/ original accused are set aside. The appellants/accused are acquitted of the offences with which they are charged. As all the appellants/accused are on bail, their bail bonds shall stand cancelled and sureties are discharged.
